87-669

NO.

Supreme Court, U.S.
FILED
OCT 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM 1987

HUBERT P. DAIGLE, PETITIONER

VERSUS

PATASCHNICK-HARRISON CONSTRUCTION COMPANY, ET AL

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

****

PETITION FOR WRIT OF CERTIORARI

****

WALTER J. SENETTE,JR.
BORNE, SENETTE, AND DUPLANTIS
709 MAIN STREET/P.O. BOX 582
FRANKLIN, LOUISIANA 70538
(318)828-2003

QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals for the Fifth Circuit erred when it refused to remand the case to the State court where the action was originally filed due to the fact that 28 USCA 1445(A) statutorily prohibited the original Jones Act action from being removed to Federal District Court.

2. Whether the United States Court of Appeals for the Fifth Circuit erred when it refused to overrule the action of the trial court in allowing, over objection, the introduction into evidence of 200 pages of extensive

documentory evidence containing details of the appellant's alleged criminal history despite the fact that this 200 page document contained allegations and material outside the scope of permissible evidence as required by Federal Rule of Evidence 609(A), a lack of proper foundation or any finding by the court that the probative value of admitting outweighed its prejudicial effect.

3. Whether the United States Court of Appeals for the Fifth Circuit erred when it refused to overrule the trial court's denial of appellant's Motion for a Mistrial when, during closing argument, counsel for

defendant improperly commented on evidence which had been excluded by a previous ruling by the trial court.

LIST OF INTERESTED PARTIES

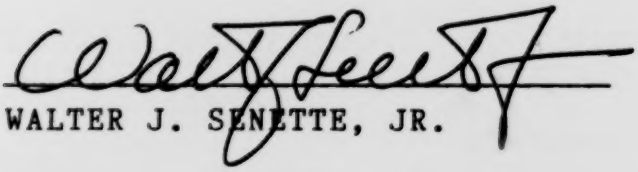
The undersigned counsel of record for the plaintiff-appellant certifies that the following listed parties and organizations have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualifications of recusal.

1. HUBERT P. DAIGLE
PLAINTIFF-APPELLANT

2. PATASCHNICK-HARRISON CONSTRUCTION COMPANY
APPELLEE-DEFENDANT

3. ALLEN J. BORNE and WALTER J. SENETTE (BORNE, SENETTE & DUPLANTIS), attorneys for APPELLANT

4. THOMAS J. GRACE, BRUCE G. WHITTAKER (COURTENAY, FORSTALL, GRACE & HEBERT) attorneys for APPELLEE



WALTER J. SENETTE, JR.

BORNE, SENETTE, AND DUPLANTIS
709 MAIN STREET
P.O.BOX 582
FRANKLIN,LOUISIANA 70538
(318) 828-2003

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
LIST OF INTERESTED PARTIES	iv
TABLE OF CONTENTS	vi
TABLE OF AUTHORITIES	vii
JURISDICTION	1
STATEMENT OF CASE	2
REASONS FOR GRANTING THE WRIT	4
CONCLUSION	25
CERTIFICATE OF SERVICE	27

TABLE OF AUTHORITIES

Page

CASES:

Lirette v. N.L. Sperry Sun, 820 F2nd 1116, (5th Cir. 1987)..... 6

Boeing Company v. Shipman, 411 F.2d 365, (5th Cir. 1969).. 15

Atlantic & Gulf Stevedor.es, Inc. v. Ellerman Lines, 369 US 355, 82 S CT 780, 7 L.Ed. 2d 798 (1962)..... 15

Comeaux v. T. L. James & Co. Inc., 702 F.2d 1023, (5th Cir. 1983)..... 15

Gaspard v. Taylor Diving & Salvage Co., 649 F 2d 372, (5th Cir. 1981) cert. denied, 455 U.S. 907 (1982)..... 15

Ferguson v. Moore-McCormack Lines, 352 US 521, 1 L.Ed. 511, 77 S.Ct. 457, (1957).. 15

Brown v. Coating Specialist, Inc., 465 F.2d 340 (5th Cir. 1972)..... 16

Shows v. M/V Red Eagle, 695 F.2d 114 [5th Cir. 1983]... 16,17

STATUTES AND REGULATIONS:

28 USCA 1445(A)..... i,5,6

28 USCA 1254(1)..... 1

FRE 609 IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME..... 11,12

FRE 609(a)..... ii,7, 12,14

FRE 609(b)..... 13,14

RULE 403. EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME..... 11,12

RULE 17(a)(c) Supreme Court Rules..... 4

RULE 17 Supreme Court Rules..... 7,25

FRE RULE 103..... 8,13

FRE Rule 103(a)..... 9,16

FRE 802..... 11

FRE 801-804..... 13

75 Am. Jur. 2nd 253
page 252-254..... 24

STATEMENT OF GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS ENVOKED

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on July 2, 1987, rehearing denied July 27, 1987 in the action styled Hubert P. Daigle v. Pataschnick-Harrison Construction Company, in the United States Court of Appeals for the Fifth Circuit No. 86-4631. The jurisdiction of the court is invoked pursuant to the provisions of 28 U.S.C. Section 1254(1).

STATEMENT OF THE CASE

Appellant, Hubert P. Daigle (hereafter Daigle) was employed as a seaman for the defendant Pataschnick-Harrison Construction Company (hereafter defendant). Daigle was injured when he slipped and fell down a stairwell aboard a vessel in navigation. Daigle filed a suit in state court in the 16th Judicial District Court in Franklin, St. Mary Parish, Louisiana, under the Jones Act for personal injury damages incurred as a result of this accident. Pursuant to a motion filed by

defendant, the case was removed to the United States District Court for the Western District of Louisiana in Lafayette, Louisiana.

Trial was held and judgment rendered by a jury on July 30, 1986, and signed by Judge John Duhe, Jr. on August 5, 1986. On August 15, 1986 Judge John Duhe, Jr. rendered judgment denying Daigle's Motion for a JNOV and in the alternative a New Trial.

Daigle timely appealed the decision to the United States Court of Appeal for the Fifth Circuit. The Court of Appeals rendered an opinion affirming the lower court on July 2, 1987. On July 27, 1987 Daigle's petition for a rehearing was denied.

REASONS FOR GRANTING THE WRIT

This court should grant the appellant's Petition for a Writ of Certiorari because of the failure of the United States District Court for the Western District of Louisiana and United States Court of Appeals for the Fifth Circuit to properly apply established jurisprudential and statutory rules of evidence and procedure. Appellant believes the foregoing Reasons for Granting the Writ are in accord with the guidelines set forth in Rule 17(a)(c) of the Supreme Court Rules.

The facts of this case are unremarkable. Appellant was injured

when he fell down a stairway while working as a seaman on a vessel in navigation. As a result of this fall he sustained serious injury which rendered him permanently disabled.

Did the United States Court of Appeals for the Fifth Circuit err when it refused to remand the case to the State court where the action was originally filed due to the fact that 28 USCA 1445(A) statutorily prohibited the original Jones Act action from being removed to Federal District Court?

The Court of Appeals for the Fifth Circuit erred when it failed to remand this cause back to state court in the Sixteenth Judicial District Court in St. Mary Parish, Louisiana despite the fact that federal law expressly prohibits the

removal of a Jones Act case.[1] As noted earlier this action was commenced by the appellant in state court and improperly removed by motion of the defendant. The court reasoned that while the removal was contrary to law the fact that appellant failed to object until after trial operated as a waiver of his right to object.[2]

This is an improper award of jurisdiction to a federal district court which is impermissible under the laws of our constitution. Section 1445(A) statutorily excludes from the district court subject matter jurisdiction in

---

1 28 USCA 1445(A)

2 Lirette v. N.L. Sperry Sun, Inc. 820 F2nd 116, (5th Cir. 1987)

Jones Act cases commenced in state court by the injured seaman and may not be waived.

This court has an obligation under Rule 17 of the Supreme Court Rules to accept writs in this matter to instruct the courts of the entire nation that grants of subject matter jurisdiction may not be expanded except by specific grants of legislative authority.

Did the United States Court of Appeals for the Fifth Circuit err when it refused to overrule the action of the trial court in allowing, over objection, the introduction into evidence of 200 pages of extensive documentory evidence containing details of the appellant's alleged criminal history despite the fact that this 200 page document contained allegations and material outside the scope of permissible evidence as required by Federal Rule of Evidence 609(A), a lack of proper foundation or any finding by the court

that the probative value of admitting outweighed its prejudicial effect.

The trial court committed error in this case in admitting into evidence, over objection, a 200 page document which contained the plaintiff's alleged criminal history and in allowing defendant's counsel to discuss evidence not in the record before the jury during closing argument.

In analyzing on appeal the trial court's admission of the plaintiff's criminal record into evidence FRE Rule 103 provides for the following framework or standard of review. First, was the ruling admitting the evidence erroneous? Second, did the plaintiff properly object to the ruling or is the admission "plain error" within FRE 103? Third, did

the ruling affect a "substantial right" of the plaintiff as that term is used in FRE 103 (a).

Defendant's Exhibit 10 is a 200 plus page booklet which details the alleged criminal record of the appellant.[3] It starts in 1960 or 26 years ago with a police report of a fight at a bar between four junviles including the plaintiff which did not result in any arrest. Also included in the booklet are numerous narrative police reports, witnesses statements, and hand written comments concerning the

---

[3] Attached to this brief as Appendix A is a summary of Defendant's Exhibit No. 10.

incidents.[4] All 35 of the incidents were either misdemeanors or were reduced to misdemeanors before the plaintiff was found guilty or pled guilty. Of the 35 incidents 26 were more that 10 years old.

This exhibit was allegely introduced to impeach the credibility of the plaintiff during his cross examination[5] and immediately after he had admitted that he had been charged and convicted of a number of crimes.[6] It is the appellant's position that it was

---

[4] Id.

[5] Transcript, Vol. II, p.25.

[6] Transcript, Vol. II, pp. 18-25.

introduced to show Daigle to be a "bad man" and to cause the jury to decide the case on factors other than the merits

At trial the plaintiff initally objected to the admissibility of the evidence as containing hearsay in violation of FRE 802. This objection was overruled.

The following day and before the exhibit was shown to the jury the plaintiff reurged his objection and stated that the exhibit was "extremely damaging and go back a number of years." Although not stated in the specific terms of FRE 609 and 403 it is clear from the context of trial that this was the intended objection.

Not one of these 35 incidents were admissible under FRE 609. Even assuming that some of these crimes qualify under FRE 609 (a) the court is required to also determine whether "the probative value of admitting this evidence outweighs its prejudicial effect." The trial court did not do this in this case. Nor did the trial court make a similar determination under FRE 403 which provides for the exclusion of relevant but excessively prejudicial evidence.[7]

---

[7] RULE 403. EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME.

FRE 103 provides (1) that when an objection to evidence is made it must be "timely" and must state the specific grounds for the objection "if the specific ground was not apparent from the context." The appellant argues that the objections made by plaintiff were proper and the specific grounds for such were evident from the context. Although the inital objection was "hearsay, nothing else" counsel went on to state "I haven't had an opportunity to review everything that he had in front of him **either**."[8] This is clearly an invocation of an objection based on both FRE 801-804 [Hearsay] and FRE 609 (b) [requires

---

[8] Transcript, Vol. II, p.25.

notice to use conviction more than 10 years old]. Plaintiff's counsel had not seen Defendant's Exhibit No. 10 prior to it being offered into evidence. Further it is clear from the context in which the objection was made that counsel was also making a FRE 609 (a) objection as well when in response to a question by the court as to which item he was objecting to he stated "As to the whole thing."[9] It is obvious that this was an objection to the introduction of the entire exhibit under FRE 609 (a) and (b) and not only to those parts which were hearsay.

---

[9] Transcript, Vol. II p. 25.

This is a Jones Act case. It was tried to a jury. The United States Supreme Court has indicated that the congressional intent in enacting the Jones Act was to secure to seamen jury determinations of factual issues in a larger proportion of cases and to a larger degree than would be true of other causes of actions tried in federal court.[10] It is important to keep this in mind when considering the effect of

---

[10] Boeing Company v. Shipman, 411 F.2d 365, (5th Cir. 1969); Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, 369 US 355, 82 S.Ct. 780, 7 L.Ed.2d 798 (1962); Comeaux v. T. L. James & Co. Inc., 702 F.2d 1023, (5th Cir. 1983); Gaspard v. Taylor Diving & Salvage Co., 649 F.2d 372, (5th Cir. 1981) cert. denied, 455 US 907 (1982); Ferguson v. Moore-McCormack Lines, 352 US 521, 1 L ed 511, 77 S CT 457, (1957).

Defendant's Exhibit 10 on the jury verdict and plaintiff's substantial rights.[11]

In the present case an analysis of the facts presented the jury in light of the jury's answers to the jury interrogatories shows that the admission of D-10 did "trigger their punitive instincts."[12] The jury, despite the

---

[11] FRE Rule 103 (a)

[12] Shows V. M/V Red Eagle, 695 F.2d 114, at 119 (5th Cir. 1983) See also Brown v Coating Specialists, Inc., 465 F.2d 340 (5tn Cir. 1972) where the plaintiff admitted to two felony convictions and the court reversed and remanded for a new trial because evidence of other bad acts which did not result in convictions was put before the jury. A consideration in that case was the fact that the jury answered "no" to the very first question of whether or not a an accident took place. Brown at p. 341.

overwhelming evidence to the contrary, found that the defendant was not negligent and the vessel seaworthy.

In any event, the issue of the plaintiff's credibility was central to any decision in the case as defendant's counsel stated no less than three separate times in his closing argument.[13]

Finally and perhaps most importantly in terms of the "realities of the courtroom"[14] the extrinsic

---

[13] Transcript, Vol. III p.37 (twice) and p. 41 when defendant's counsel stated "Every thing that goes on in this case is really over the major issue of the credibility of the witnesses."

[14] Shows V. M/V Red Eagle, 695 F.2d 114, at 119 (5th Cir. 1983)

evidence in this case was real or documentary evidence. This court is no doubt aware of the tremedous affect real-documentary evidence has on a jury. D-10 speakes for itself. The 200 pages of official looking documents detail each and evey incident in the plaintiff's life that involved him with the police.

Did the United States Court of Appeals for the Fifth Circuit err when it refused to overrule the trial court's denial of appellant's Motion for a Mistrial when, during closing argument, counsel for defendant improperly commented on evidence which had been excluded by a previous ruling by the trial court.

In closing argument the defendant referred to a lawsuit concerning a

separate incident alleging that the plaintiff had filed a separate lawsuit because of a fight he had been in with a deputy sheriff in which he alleged that he had also hurt his back. Despite the fact that he introduced no evidence of this lawsuit the defendant referred to it in his closing argument. Was this improper argument and to what extent did it affect the jury verdict?

The plaintiff was severely prejudiced when counsel for defendant PATASCHNICK-HARRISON made specific reference to evidence that had been excluded from being admitted into trial. This was done twice: once by interrupting plaintiff counsel's closing

argument to comment on this excluded evidence and again in defense counsel's own closing statement.[15]

During the course of the trial, defendant Pataschnick-Harrison, attempted to call as a witness a police officer who had been involved in an altercation with Mr. and Mrs. Daigle. Defendant had failed to list this officer in the Pre-trial Order and plaintiff was suprised at trial with the suggestion that he would be called as a witness. Plaintiff objected to his testimony being allowed and this objection was sustained. The police officer was not allowed to testify.

---

[15] Transcript, Vol. III pp. 28-29 and 47-48.

In his opening statement, counsel for defendant told the jury that he would offer evidence that the plaintiff had spit in this officer's face during the altercation.[16] Mr. Daigle denied that he had ever done so and defendant offered no proof to substantiate this version of the facts. The only possible reason for offering such evidence is obvious. It was intended to prejudice the jury against Mr. Daigle.

During closing statement, plaintiff's counsel reminded the jury of defendant's promise to prove that Hubert Daigle had spit in this officer's face but had failed to produce any evidence

---

[16] Transcript, Vol. I p.30.

in support of this promise. At this point in the trial, counsel for defendant interrupted plaintiff counsel's argument and in the presence of the jury objected to plaintiff counsel's reference to his failure to produce any evidence on this fact. Defendant's counsel argued in front of the jury that the only reason the testimony of the police officer was not offered was because plaintiff's counsel had prevented him from doing so. Immediately, counsel for plaintiff requested a side bar conference and asked for a mistrial on the bases of this extrememly prejudicial behavior and statements by defense counsel. The court denied the motion informing

plaintiff counsel that it was not improper. With that ruling in hand defense counsel re-iterated these remarks during his own closing statement telling the jury that the reason the officer did not testify was due to plaintifff counsel's objection.

It is improper for counsel in his argument to the jury to comment on evidence which was excluded by the court when offered on the trial, suggest the impression that certain excluded evidence would have made on the jury had the court permitted counsel to introduce it or otherwise to make statements which are intended to get before the jury

facts which counsel was not entitled to give in evidence on the trial.[17]

The effect of the courts ruling in this matter was devastating to the plaintiff's right to a trial by jury based on Federal procedural and evidenciary rules. By allowing defense counsel to make such statements without admonishion and in fact allow him to re-urge the remarks during his closing, the earlier excluded evidence was placed before the jury without the benefit of cross examination or prior notice (in that the officer was not named as a witness on the Pre-trial Order).

---

[17] 75 Am. Jur. 2nd 253 page 252-254.

CONCLUSION

Writs should be granted pursuant to Supreme Court Rule 17 for the following reasons. (1) The refusal to remand the case after improper removal was in violation of established constitutional and statutory limitations on the subject matter jurisdiction of federal district courts. (2) The appellant was prejudiced by the improper introduction of evidence which failed to conform to established statutory and jurisprudential guidelines. (3) The appellant was prejudiced by the trial court's denial of a mistrial motion after defendant's counsel had inflamed

the jury by commenting on alleged facts which had been excluded from evidence.

By Counsel:

WALTER J. SENETTE, JR.
BORNE, SENETTE & DUPLANTIS
709 MAIN STREET
P. O. BOX 582
FRANKLIN, LOUISIANA 70538
(318) 828-2003

BY:
WALTER J. SENETTE, JR.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading had been served on all counsel of record by placing a copy of same in United States mail, postage prepaid on this 9TH day of OCTOBER, 1987.

WALTER J. SENETTE, JR.